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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

On Writ of Certiorari to The Court of Civil Appeals For the Fourth Supreme Judicial District of Texas

COMMENTS ON BRIEF OF INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

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In its brief Amicus Curiae the Interstate Commerce Commission undertook to discuss two questions: "(1) The effect of Section 1(18) on the 1904 contract, and (2) The right of the state court to pass on the reasonableness of the compensation for the use of respondent's line by petitioner." In the course of its discussion the Commission clearly affirms two propositions previously laid down by Petitioners:

(a) That whether the notice of termination did or did not have the effect of ending the 1904 contract, Petitioner Trustee was obliged by Section 1 (18) of the Interstate Commerce Act to continue his operations over the facilities of Respondent after the date when the notice is claimed to have taken effect.

(b) That an application to the Commission for a certificate of public convenience and necessity, authorizing the abandonment of such operations by Petitioner Trustee might have been, and now may be, filed and prosecuted by Respondent, as well as by Petitioners.

1. The Commission, in its discussion of the first question which it undertook to discuss, fell into some errors and in the end leaves us in grave doubt about its actual position. It first assumed that which it set out to establish. It stated that the trial court "held that the 1904 contract was legally terminated." It then said, immediately, "The contract having been legally terminated * * * ."

Proceeding thereafter to discuss this question already disposed of by assumption, the Commission cited CENTRAL NEW ENGLAND RAILWAY CO. v. BOSTON & A. R. CO., 279 U.S. 415. But it omitted wholly to note that the contract in that case contained no provision whatever for termination by notice or at the option of either party. There the question was whether an abandonment certificate of the Commission had the effect of, or could substitute for, a termination clause; while here the question is whether a termination clause, written by the parties, had been slightly modified by subsequent legislation.

The Commission also assumed that the notice of termination was given because Respondent thought the rentals or compensation provided for in the contract of 1904 were in-

adequate. Respondent itself gave an entirely different reason for serving the notice (R. 42).

Apparently without assigning any reason for the conclusion, the Commission then asserted its agreement with the trial court "that the 1904 contract was terminated" by the notice alone. However, it immediately contradicted that statement by adding that the contract was terminated only "in so far as the parties could legally terminate it." How far that was, the Commission did not say, except for the inescapable inference to be drawn from its next statement that "operations *thereunder*" (that is, under the contract) "could not be discontinued without a certificate from the Commission."

2. Having thus carefully qualified its agreement with the trial court on the termination of the 1904 contract, the Commission proceeds to a discussion of its second question. At the outset of that discussion the Commission says: The 1904 contract "having been legally terminated, as found by the lower court, the question arises as to who can accord it full relief, Commission or Court." To make doubly sure that even this language should not be construed to place the Commission in unqualified agreement with the trial court, it adds: "It is undoubtedly true that the 1904 contract having been legally terminated in 1941, *so far as* within the power of the parties to terminate it, subsequent operations over the line of Respondent by Petitioner would be under a new trackage agreement, which, under the 1940 amendment to Section 5, requires Commission approval."

The sentence just quoted would be a substantial repetition of what was said on oral argument by counsel for Petitioners if it were paraphrased to read "If it be contended that the 1904 contract was legally terminated in 1941, it would necessarily follow that operations over the line of Re-

spondent by Petitioner would be under a new trackage agreement, which, under the 1940 amendment of Section 5, requires Commission approval." In other words, the law required a continuance of the operations which had been conducted under the 1904 contract. Thus, continuing operations either were or were not conducted under the 1904 contract. If they were, as contended by Petitioners, then the 1904 contract is still in existence and the judgment below was wrong. If the 1904 contract, as contended by Respondent and held by the courts below, was absolutely terminated in 1941, then the operations thereafter conducted by Petitioners, pursuant to the requirements of law, must have been conducted under *a new arrangement*. That arrangement was not; and was not evidenced by, an express contract. The law must imply a contract in such a case, because the conduct of the Petitioners was not wrongful or tortious. The Trustee on the contrary, by continuing his operations, was yielding full obedience to the mandate of the law. In such a situation the Commission was undoubtedly correct in declaring that the "new trackage agreement," implied though it might be, would require Commission approval.

After conceding that the new arrangement, if there was one, could not, consistently with the requirements of Section 5 of the Interstate Commerce Act, be placed in effect without the approval of the Commission, that body, in its brief, concludes that the Commission's power with reference to trackage arrangements under Section 5 being prospective only, it was entirely proper and lawful for the Respondent, after by-passing the Commission, to resort in the end to a State court, because the Commission had no power to look backwards and do anything with respect to trackage operations which had already been conducted without its consent or approval.

We can find no other ground asserted by the Commission

as a basis for its conclusion on the second question which it undertook to discuss. It is difficult to believe that the Commission and its counsel have overlooked or forgotten the many remedies, civil and criminal, which the Act places at the disposal of the Commission.

If two carriers should enter into a one-year trackage agreement without any resort to or approval by the Commission, and if at the end of the year the user should be sued by the owner for the agreed rentals, the Commission, if asked to express its views upon the rights of the parties, might as well say that it is entirely proper for the Court to grant relief because the Commission's power is prospective only. The operations have been completed. The Commission can do nothing about it, and the Court might as well proceed to judgment.

Such an attitude may conceivably express the views of some individuals connected with the Commission, but it does not reflect the temper of that Commission whose actions we find recorded in decisions rendered by this Court during the last half century, nor, in our opinion, does it reflect the policy declared in the Interstate Commerce Act.

ROBERT H. KELLEY,
Attorney for Petitioners.